

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mitchell v. The Owners, Strata Plan KAS 1202*,
2015 BCSC 2153

Date: 20151124
Docket: 102512
Registry: Kelowna

Between:

Mary Lou Mitchell

Petitioner

And

The Owners, Strata Plan KAS 1202

Respondent

Corrected Judgment: The text of the judgment was corrected on the front page on
January 5, 2016

Before: The Honourable Mr. Justice Betton

Reasons for Judgment

Counsel for the Petitioner:

M.D. Fischer

Counsel for the Respondent:

J.C. Chandler

Place and Date of Trial/Hearing:

Kelowna, B.C.
May 7 and June 3, 2015

Place and Date of Judgment:

Kelowna, B.C.
November 24, 2015

Introduction

[1] The petitioner owns a strata unit within Strata Corporation KAS 1202 (“Strata Corporation”). The development consists of 126 condominium units. Over a period of years, the petitioner has challenged the respondent in respect of its governance and matters of finance. In response, the respondent has acknowledged some errors and has or is taking corrective measures. The interactions between the petitioner and the respondent have been and continue to be strained, resulting in this proceeding.

[2] The petitioner now seeks declarations intended to govern the respondent’s conduct toward her and to ensure its compliance with the *Strata Property Act*, S.B.C. 1998, c. 43 [Act], in the future.

Background

[3] The financial and governance concerns of the petitioner relevant to these proceedings are:

1. Finance:
 - a. The management of, and expenditures from, the contingency reserve fund;
 - b. the respondent’s use of special levies as a means of funding works, without meeting the requirements of the *Act* for such levies; and
 - c. emergency spending.
2. Governance:
 - a. the indication by the respondent that it would attach a lien to her property if she failed to contribute, as required, to the above, despite her protestations about the validity of the process;
 - b. the process used by the respondent to amend its bylaws in 2012;
 - c. responses to requests for documents; and

- d. the respondent's treatment of the petitioner in response to her pursuit of these issues and management of privacy concerns.

[4] The petitioner purchased her strata lot in 1998. She has been concerned regarding the actions and approach to the business of the respondent for some time. For purposes of these proceedings, the petitioner focuses on actions and events beginning in 2009. She has persistently challenged and insisted on reforms by the respondent since at least that time. This has created tensions between the parties. On May 31, 2011, the president of the strata council sent a letter regarding special levies, one of the central complaints, stating, "... Council feels it has spent enough time on this issue. It will not respond to any further inquiries on your part regarding the levy or any other resolutions passed by the ownership at General Meetings. Management has also been instructed not to respond to you on these matters." Subsequent dealings with "management" were also strained at times. One particular interaction prompted the petitioner to seek an apology for the manager's conduct. The council president's response to that included a voice message that stated:

I've read your letter and as far as I'm concerned you're going to have to eh iron this out with Michael and Michael can explain all of that to you. Uum I've brought this up to council once before and they have washed their hands of it and they've left it in Michael's hands so you can get a hold of Michael on Monday and he can explain things for you and as far as the written letter to apologize that's got nothing to do with council, that's strictly between you and Michael. OK, Bye now.

This occurred in or about April 2012. That appears to be the point that the petitioner engaged counsel to assist her in the matters.

[5] Although progress was made after counsel's involvement, there remained an atmosphere of animosity. An indication of that can be seen in a letter of October 4, 2012, by the management company to the petitioner, threatening to place a lien against her property if disputed assessment monies were not paid; an issue counsel were continuing to address. The petitioner's response to that particular issue was to place the disputed \$616.01 into a trust with the petitioner's counsel on October 19, 2012. Counsel for the respondent was not content with that and by November 30,

2012, they insisted the monies be paid to prevent further proceedings by the strata. Ultimately, the monies were transferred to the strata to hold in trust but little progress was made in resolving the petitioner's concerns and by April 2013, the petitioner was also warning she would proceed with court processes to resolve the issues.

[6] The respondent held a meeting on September 17, 2013, that resulted in instructions to its counsel to try to resolve the issues. Armed with that knowledge and on October 10, 2013, the petitioner demanded a settlement proposal from the respondent saying those instructions provided:

... a final opportunity for the Strata Council to provide a meaningful and specific plan and timetable for resolving these matters. As a result, my client looks forward to receiving a settlement offer that takes into account all of the matters raised in our correspondence of April 4, 2013 by close of business on November 1, 2013.

[7] On the evidence before me, the only response from the respondent was a letter of the same date demanding payment by the petitioner of the disputed levies.

[8] With the proverbial lines then drawn in the sand, what followed thereafter was a series of demands by counsel for the petitioner for various documents. As a consequence of being dissatisfied with the results of those demands, and generally with the lack of a resolution of the issues, she proceeded to file this petition on March 13, 2014.

[9] There was an agreement between the parties that the respondent would delay filing its response while there were further efforts to resolve the issues raised in the petition. The process was somewhat successful, in that a number of the historical issues that had given rise to the issues in the first place were dealt with. However, the fact of having filed the petition and the specific remedies being sought gave rise to new issues, including the question of costs.

[10] In respect of the areas of success, counsel for the respondent said this in their letter of December 2, 2014:

As you may be aware, our client recently held a Special General Meeting ("SGM") to discuss your client's Petition and surrounding issues.

At the SGM, we understand the Strata Council and owners discussed this matter at length and came to the conclusion that all of your client's concerns have now been addressed.

More specifically, we understand:

1. Kelowna Condominium Services has provided a letter of apology to your client;
2. the impugned Special Levies have been edited and ratified;
3. the bylaws are currently being revised by the property manager and Strata Council and will be sent to the writer for review when completed;

all requested document disclosure has been provided to your client.

Please note, our client is not willing to provide an apology from Council nor is our client willing to pay your client's legal costs.

Thus, it is our client's position that it has done all it can with regards to addressing your client's concerns; it will do no more, save for the completion of the bylaw revisions.

We trust your client is satisfied with the foregoing. We look forward to your confirmation that this matter is now settled and to the subsequent filing of a Notice of Discontinuance for your client's Petition.

The letter of apology referred to is dated November 3, 2014, and stated:

Kelowna Condominium Services Ltd. is writing to you on behalf of Michael Dumont, a past employee, who at the time of the incident was an employee of Kelowna Condominium Services Ltd.

We understand that you felt that Mr. Dumont was short and did not allow you to fully express your concerns to Council.

On behalf of Kelowna Condominium Services Ltd. I would like to offer my sincere apology for his conduct that was less than professional in the eyes of Kelowna Condominium Services Ltd.

[11] Counsel for the petitioner saw the state of the issues quite differently. This is detailed in his reply of December 17, 2014, which I quote as follows:

It is true that some of the items of concern raised in our client's Petition to the BC Supreme Court have been addressed to some extent:

1. Our client is pleased that an SGM was held to ratify the deficient prior special levies and considers that matter to be resolved. You may release the disputed special levy amounts, without interest, held in trust to your client and pay the remainder amount to Ms. Mitchell.
2. An apology letter was provided to our client from KCS in relation to the conduct of Mr. Dumont, which will suffice.

However, there are several other items of the Petition that have not been resolved. The Strata Corporation continues to treat our client in an unfair manner and the villainizing, intimidating and/or bullying behaviour continues. Even after requests were made by our client to have the Strata Council cease distributing our letters to the ownership without also distributing the letters of the Strata Corporation, the Strata Council proceeded to distribute our October 14, 2014 letter to the ownership at the SGM in front of our client. Not only this, but the Strata Corporation has refused to respond in any way to our prior letters. This blatant disregard of our reasonable requests further proves that the Strata Corporation continues to treat our client in a high-handed and offensive manner.

Further, all requested documents have **not** been provided to our client, as requested on numerous occasions and even after the Strata Manager at the SGM promised that all other documents requested would be provided to our client.

The Strata Council may be working towards a bylaw revision; however, the bylaw correction is not being treated with appropriate urgency, nor were the draft bylaws provided to our client within the promised time frame.

Our client has provided your client with ample opportunity to correct these remaining matters and our client now intends to proceed with those items of the Petition that have not been addressed by your client. We intend to proceed with those items of Petition seeking relief as follows:

1. Promptly provide documents when properly requested by owners pursuant to sections 35, 36, 59 and 115(1) of the Act, within the time limits imposed pursuant to the Act;
2. Cease villainizing, intimidating, and/or bullying dissenting owners;
3. A declaration that the 2012 bylaws, as registered, were not properly approved by the Ownership, and an Order that those bylaws do not govern the Strata Corporation; and
4. A declaration that the Strata Corporation has improperly threatened to place liens for amounts which are not properly owing to the Strata Corporation and an Order that the Strata Corporation not threaten to place liens for amounts not properly approved in accordance with the provisions of the Act.
5. Costs or Special Costs.

We will also seek direction from the Court on the Strata Corporation's method of funding this litigation to ensure that our client is not funding her own litigation contrary to the *Strata Property Act*.

[Emphasis in original.]

[12] On January 8, 2015, the respondent then proposed a round table meeting:

Our clients would like us to schedule a round-table meeting among the strata council, your client, the lawyers and the strata property manager to discuss all of the matters in dispute and determine where things are at for the parties.

Can you please advise as to whether Ms. Mitchell would be agreeable to this, and if so, we can coordinate a date and time that works for everyone.

On January 20, 2015, the petitioner agreed to the meeting on condition that the following were provided:

1. Written confirmation that the Strata Corporation will attend the proposed round table meeting with the intent to, in good faith, negotiate a settlement and/or resolution of the remaining issues from the Petition;
2. Written confirmation that the Strata Corporation will contribute \$600 towards our client's costs of preparing for and attending the proposed meeting, without prejudice to any other arguments with respect to costs of either party;
3. A written response to each of the matters identified in our December 17, 2014 letter and specific confirmation that the Strata is prepared to back away from previous refusals to provide an apology and/or pay our client's costs of the proceeding; and
4. Documentation proving that our client is not contributing to the Strata Corporation's expenses related to defending her own proceeding.

The respondent rejected those conditions on January 22, 2015, and through counsel stated:

Thank you for the past couple of weeks as we attempt to bring this issue to an acceptable conclusion.

As you were aware, Council had a meeting this morning and I have the following instructions from Council

- Please reply to Fischer and Co, explaining that Council / KCS will not be attending the aforementioned round table discussion as the apology from council and the legal fees are not part of the negotiations, therefore including the demand to pay \$600.00 for their fees to attend.
- Please represent the Strata Corporation as required, should a petition move forward from Fischer and Company and a reply needs to be filed etc.
- Council was directed by the Owners as per the SGM October 30th 2014, there will be no apology and there will be no fees paid on May Lou's behalf, and if needed, will go to court. The round table demands are contrary to this mandate.

Please let me know if you need me to elaborate further, or if you have any other concerns.

[13] It was apparent to the parties that a complete resolution by consent was not possible and the response was filed on March 5, 2015.

[14] It is that history that prompted counsel to indicate at the commencement of this hearing that most of the specific issues had been resolved. While that may be a fair observation, they ultimately agreed that the nature of the relief sought in the petition and the issue of costs both require that I review the history of all of the issues, including those that have been resolved, and draw conclusions about the parties' conduct.

[15] Most of the relief sought is for a requirement that the respondent meets its obligations under the *Act* in the future, pursuant to ss. 164 and 165 of the *Act*. This will be addressed more comprehensively; however, if that remedy is available at all, the basis for it would be primarily on the basis of non-compliance in the past.

[16] I will now return to the list of financial and governance issues set out above.

Finance

[17] The petitioner has challenged the respondent over a period of years in respect of its compliance with the *Act* in collecting and spending funds.

[18] For some time prior to 2010, the respondent collected \$10,000 annually for capital expenditures. The monies were placed in the operating account and were used at the discretion of the respondent.

[19] The petitioner complained about the process, but paid amounts required "under protest" until 2010. That practice was abandoned after 2009, apparently in favour of the use of special levies.

[20] At AGMs for 2010, 2011 and 2012, the respondent obtained authority for special levies. The petitioner, however, expressed concerns about the compliance with s. 108 of the *Act*. That section requires specific information about the levy to be distributed prior to the AGM, including a clear purpose, and that it be approved by a $\frac{3}{4}$ majority vote at the AGM.

[21] An additional concern at the 2010 AGM was an amendment to the proposed resolution without proper advance notice to owners.

[22] It was in relation to these matters that the letters and dialogue referred to in paragraphs 4 and 5 above occurred. After the monies were placed in trust, the respondent continued to assess interest on it, as the amounts had not been paid to the respondent. The rate charged was 10% per month.

[23] The respondent convened a special general meeting on October 30, 2014, and the special levies for 2010, 2011 and 2012 were ratified. As a result, on December 17, 2014, the petitioner agreed to the release of the monies held in trust, as noted above.

[24] There was a special levy in 2013, but the petitioner has not indicated any objection to it. This prompted the respondent to observe in its submission that “[t]here was a progression by the Strata Corporation to comply with the Act, as evidenced by the change in the wording of the resolutions, before this Petition proceeding was commenced, to the extent that Ms. Mitchell does not raise concern with the 2013 special levy.”

[25] The petitioner also raised concern with the respondent about unapproved expenditures by the respondent that were not of the nature allowed by ss. 98(3) and (5) of the *Act*. Those provisions say:

98 (3) The expenditure may be made out of the operating fund or contingency reserve fund if there are reasonable grounds to believe that an immediate expenditure is necessary to ensure safety or prevent significant loss or damage, whether physical or otherwise.

(5) Any expenditure under subsection (3) must not exceed the minimum amount needed to ensure safety or prevent significant loss or damage.

[26] In her affidavit evidence, the petitioner describes inconsistencies in the respondent’s approach to expenditures on items that have not specifically been approved or where expenses exceed those that have been approved. Several examples were provided. Among the examples are specific concerns in respect of expenditures in 2010 for shingles, in 2011 for doors, \$847.83 for windows in December 2013, and \$5,666.50 in excess of an approved amount for roof repairs in

March 2014. She also referenced expenses for removal and replacing trees and shrubs on common property in 2011 and 2012.

[27] The respondent dealt with the specific items referenced. In respect of the roof repair, there had been approval to spend \$91,350 and the amount spent was \$97,016.50. The respondent said the expenses were “necessary to prevent further leaks and additional damages”. It confirms the expenses for the windows but does not specifically address any deficiencies in the process or approval.

[28] It says the expenses were proper and in the alternative “...the total of four (4) instances raised by the Petitioner in her affidavit of ‘improper’ spending since March 2010, do not justify an order of this court to prevent such future conduct occurring.”

Governance

The process used by the respondent to amend bylaws in 2012

[29] The petitioner has taken issue with the process used to attempt to amend the bylaws in 2012, which she felt left doubt about what bylaws were in fact in place.

[30] Generally, bylaws must be amended at annual or special general meetings (*Act*, s. 128). The *Act* requires at least two weeks’ notice of annual or special general meetings with a description of the proposed wording of any resolution for such changes (s. 45). The notice to owners for the 2012 AGM included resolutions for amendment of the bylaws. The petitioner says that the resolutions themselves were amended at the meeting without compliance with s. 50(2) of the *Act*.

[31] Bylaws are filed in a central registry accompanied by a certification. The petitioner pointed out that a flawed certification accompanied these bylaws. The petitioner brought the issues to the attention of the respondent at least by April 2013.

[32] At its AGM in April 2015, new bylaws were properly approved and they were filed appropriately thereafter.

Responses to requests for documents

[33] Section 36 of the *Act* entitles an owner to view and obtain copies of various documents within 2 weeks of a request. The petitioner, at points in time, has requested documents. The responses to those requests have not been to the satisfaction of the petitioner, either in respect of timing and/or content. The documents requested in December 2013, were not provided until October 2014.

[34] A later request over which there was disagreement was in respect of the respondent's legal expenses for defending this petition. There had been some disclosure of a summary nature but supporting documents were withheld. Dialogue with counsel at the outset of this hearing resulted in an agreement for disclosure of the supporting documents with redactions for any information protected by solicitor client privilege.

The respondent's treatment of the petitioner in response to her pursuit of these issues and management of privacy concerns

[35] The foundation of the petitioner's remaining claims for relief is that the respondent's response to her efforts has been unacceptable. In addition to the issues set out above in respect of specific financial and governance matters, the petitioner raises concerns of the respondent's general attitude toward her efforts. She adopts descriptors referred to above, including, "... villainizing, intimidating and/or bullying behaviour".

[36] A specific concern was the threat by the respondent to place a lien against the petitioner's unit for nonpayment of the disputed amounts. The communications placed in evidence show that the threat of lien was made on October 4, 2012. In response, the petitioner paid the disputed amounts into trust with her then counsel on October 19, 2012. On November 30, 2012, counsel for the respondent dismissed any suggestion of problems with the special levies and indicated enforcement actions would be taken if the amounts in dispute remained unpaid. On February 7, 2013, the petitioner paid the amounts into the respondent's trust account using the process set out in s. 114 of the *Act*. After the ratification of the special levies on

December 17, 2014, the petitioner agreed that the amounts in trust could be released.

Issues and Positions of the Parties

[37] When counsel began their submissions on the hearing of this petition, they advised that, indeed, the parties had resolved most of the issues that had prompted the petitioner to initiate the proceedings.

[38] The petitioner referenced a “summary of relief” sought which contained eight listed items.

[39] Two were in relation to the 2012 bylaws and are no longer being pursued in light of the respondent rectifying the issues with those bylaws, as noted above.

[40] A third item, dealing with the petitioner obtaining a detailed accounting of legal expenses was dealt with during the course of the hearing of the petition and is no longer being pursued, based on the agreement as noted above.

[41] In addition, counsel agreed that the claim for special costs or costs in the alternative could only be argued after this decision was rendered. Each party has indicated that, in these circumstances, they will be seeking costs.

[42] There is a request for “a declaration that the Strata Corporation has improperly threatened to place liens for amounts which are not properly owing to the Strata Corporation”, as well as for an order that the respondent not threaten to place liens for amounts not properly approved in accordance with the provisions of the *Act*.

[43] The remaining relief sought is injunctive in nature. The orders would constrain the conduct of the respondent in the future based on the allegations of specific contraventions referenced above and also based on the more general allegations of inappropriate conduct to the petitioner and other “dissenting owners”. The petitioner’s specific articulation of that relief is as follows:

1. An Order that the Respondent ‘The Owners, Strata Plan KAS 1202’ (the “Strata Corporation”) perform those duties that it is required to perform

under the bylaws of the Strata Corporation, and the provisions of the Strata Property Act, and that the Respondent stop contravening the Strata Corporation’s bylaws and the *Strata Property Act* (the “Act”). Without limiting the generality of the foregoing, the Petitioner seeks Orders that the Strata Corporation and its strata council members:

- a. Cease making expenditures without legal authority and documented approval in the form of:
 - i. Minutes of council meetings where an expenditure is made pursuant to a budget line item or section 98 of the Act, and the council is approving the expenditure;
 - ii. Minutes of council meetings where council is delegating authority to an agent of the Strata Corporation to make a budgeted expenditure; or
 - iii. Minutes of an Annual or Special General Meeting of the Owners where the expenditure requires approval of the ownership.
- b. Cease spending monies out of the Contingency Reserve Fund except in compliance with sections 96 and 98 of the Act.
- c. Cease approving Special Levies which are not compliant with all of section 108 of the Act.
- d. Promptly provide documents when properly requested by owners pursuant to sections 35, 36, 59 and 115(1) of the Act, within the time limits imposed pursuant to the Act.
- e. Cease making expenditures for significant changes to the use or appearance of common property without the ¾ vote approval as required by section 71 of the Act.
- f. Cease villainizing, intimidating and/or bullying dissenting owners.

...

- 6. An Order that the Respondent cease its unfair treatment of the Petitioner.

[44] As a result and although counsel may be correct in indicating that most of the issues that prompted the petition to initiate the proceedings have been resolved, it is necessary to review the history that gave rise to the petitioner’s concerns to assess whether there was past conduct and/or contraventions of the Strata Corporation’s bylaws and the *Act*, such as to justify the relief sought or any relief.

[45] In essence, the petitioner asks the court to use ss. 164 and 165 of the *Act* to make orders that the respondent comply with the *Act* in respect of expenditures. In addition, she seeks an order to prohibit inappropriate conduct toward her or generally in the future by the respondent. Counsel for the petitioner says that the

orders to require the respondent to cease contravening the *Act*, is “the founding basis of the petition in its entirety”.

[46] The respondent acknowledges that its council “made errors in its governance”, but says that by December 17, 2014, many of the concerns had been addressed and by the date of the hearing of the petition only the injunctive relief claims remained. The respondent states that the issues are “whether the petitioner has advanced sufficient evidence to grant the orders and declarations she seeks and, if so, whether the orders sought may be granted in law.

[47] The respondent argues any concerns regarding expenditures or other impugned actions in 2010 and 2011 are statute barred.

[48] The respondent says that the conduct in issue does not warrant the intervention by the court pursuant to s. 164 or s. 165, noting that the issues of special levies, contingency reserve fund spending, bylaws and documents have all been dealt with. Other issues regarding spending on trees are in the past and the Strata Corporation has modified its procedures.

[49] The respondent also alleges that the petitioner’s characterization of the conduct of the respondent has been exaggerated.

Analysis

[50] Fundamental to this decision is a characterization of the respondent’s responses to the issues raised by the petitioner. As was stressed by counsel for the respondent, the strata council is made of lay persons performing volunteer roles. Mistakes will be made and missteps taken. Within reason, some latitude is justified when scrutinizing their conduct. At the same time, the *Act* sets up a detailed scheme and establishes processes for every aspect of the business of the respondent. Indeed, the materials include a letter from the management company sent to an owner defending the actions of the council which describes the council as “... an experienced Strata Council that goes out of its way to stay current with changes in policy and procedure.”

[51] Individual owners need to be able to trust and rely on their councils to operate within that legislative scheme. Reasonable and appropriate inquiries from owners should not be viewed as a nuisance and there is no room for arrogance in the fulfillment of those volunteer roles no matter what the title. There must also be recognition that some owners can become unreasonable and an impossible drain on the patience and time of those who do volunteer.

[52] Part of reducing conflict and misunderstanding is knowledge. Accordingly, this decision focuses on imparting knowledge through reminding and informing those affected.

[53] I will articulate my conclusions about the specific governance and financial issues and then address the orders being sought in the context of the legislative scheme.

Finance

[54] The *Act* provides for an operating fund in ss. 92(a) and 97, a contingency reserve fund in ss. 92(b), 95, 96 and 98, and for special levies pursuant to s. 108.

[55] Section 108 of the *Act* specifies the information that must be provided in the resolution to approve it. The resolution in 2010 was clearly lacking. Initial steps to address those inadequacies occurred at the 2010 AGM without proper notice.

[56] In 2011 and 2012, the deficiencies were less stark but the stated purpose of the funds, “for the purposes of funding the depreciation report” was unclear. The respondent dismissed the petitioner’s concerns in its letter of May 31, 2011. It did, however, modify its practice. After the petition was filed, it held a special general meeting to ratify the 2010, 2011 and 2012 special levies.

[57] It is apparent that the respondent was not compliant with the legislation and there is no justification for that. While practices have been modified, the only logical conclusion is that it was precipitated by the petitioner’s activism. In addition, it was a reluctant change.

[58] I turn next to other expenditures not specifically approved or emergency expenditures. In part, the answer to the question of whether the expenditures were proper is based on an assessment of what was “...the minimum amount needed”. There is nothing malicious in the expenditures and they were not for an improper purpose, rather the issue is whether the process was in full compliance with the *Act*.

[59] It is difficult to make a definitive finding on whether these expenditures exceeded the minimum required, but I do conclude that the respondent did not engage that analysis at the time. Rather, it seems to have viewed the amounts as minor and simply made a decision to spend them because it was expedient. Any exercise of such discretion must actually involve a thoughtful analysis of the issue and the determination should be communicated openly.

[60] Not all owners know what the respondent can and cannot do. Strata councils have certain powers and authority and the *Act*, in part, is to ensure transparency and that those powers are not abused. Many owners may simply assume that the respondent is acting entirely within its authority.

[61] The conclusion I reach from the evidence is that the respondent was unduly dismissive of the petitioner’s concerns.

Governance

The process used by the respondent to amend bylaws in 2012

[62] The respondent acknowledges that the process followed in 2012 was flawed, but that acknowledgement was slow to come. The issue was brought to the respondent’s attention by the petitioner at least by April 4, 2013. In her April 29, 2015 affidavit, the president of the council said, “I did not realize that the certification of the 2012 bylaws was not done properly until in or around March, 2015.” Thereafter, the issue seems to have been lost, while the issues surrounding special levies and document demands dominated the dialogue.

[63] As noted above, the problems with the bylaws were ultimately corrected in April 2015. The inference from the history of events described in the evidence is that

this was a specific result of the petition being filed. Certainly it was necessary to remedy the issue and the petitioner precipitated that occurring.

[64] The conduct giving rise to the issue was obviously not directed at the petitioner but the response is indicative of the respondent's attitude toward the petitioner's activism.

Responses to requests for documents

[65] The petitioner's request for documents relied on ss. 35 and 36 of the *Act*. As noted above, requests were made beginning December 4, 2013, with several follow-ups. Counsel advised that the requests were not met until October 2014, and after. No real explanation for the delay was provided.

[66] Although the issue regarding legal documents was resolved, that only occurred with the court's assistance during the hearing of the petition. It is further evidence of the conflict between the parties and the respondent's resistance to being as transparent as it should be in the context of the relationship and the legislation that governs it.

[67] Generally, the respondent has fallen short in its obligations in this regard. The fact that it has now complied is only a partial answer given the remedies being sought.

The respondent's treatment of the petitioner in response to her pursuit of these issues and management of privacy concerns

[68] To a large extent this issue has been dealt with in the context of the other issues.

[69] The petitioner has been persistent in her pursuit of addressing her concerns. The petitioner describes the response to her efforts as being intimidating and harassing. The petitioner also says that the respondent was selective in distributing correspondence to owners, causing her to be seen in a negative light by other owners.

[70] Her demands for apologies based on the actions of the respondent's agent were dealt with by voice message from the council president, referred to above and in subsequent communications that I have referenced. The respondent rejected any notion that it would provide an apology. The discussion of a round table to resolve the issues was scuttled, at least in part, on the basis that if that issue was to be part of the discussion the respondent would not attend.

[71] Also noted above is the fact that on November 3, 2014, an apology did come from the agent, which the petitioner said "will suffice".

[72] It is unfortunate that demands for apologies would stand in the way of resolving legal disputes and the insertion of them into the dialogue was not helpful.

[73] A specific concern was the respondent's threat of filing a lien because of the unpaid special levies. It is unclear from the evidence and submissions why the petitioner did not avail herself of the process of paying the disputed monies into trust pursuant to s. 114 of the *Act* sooner. This presumably would have precluded the respondent from proceeding with any lien or threat thereof. Without having done so, I am unable to conclude there was anything wrong with the respondent pressing for payment, including the threat of a lien.

[74] Some of the matters have been addressed only after the petition was filed. Some of the communications have had a tone of animosity. In addition, some of her written correspondence was distributed to owners without the respondent's correspondence being included, which intended, in her mind at least, to cause other owners to resent her activism, which resulted in unpleasant name-calling at AGMs.

[75] She was very concerned about the threat of action to force payment of the special levies in the face of her challenge to their legitimacy.

Available remedies

[76] Sections 164 and 165 of the *Act* are as follows:

- 164 (1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significant unfair

(a) action or threatened action by or decision of, the strata corporation, including the council, in relation to the owner or tenant, or;

(b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

(2) For the purposes of subsection (1), the court may

(a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,

(b) vary a transaction or resolution, and

(c) regulate the conduct of the strata corporation's future affairs.

165 On application of an owner, tenant, mortgagee or a strata lot or interested person, the Supreme Court may do one or more of the following:

(a) order the strata corporation to perform a duty it is required to perform under this Act, the bylaws or the rules;

(b) order the strata corporation to stop contravening this Act, the regulations, the bylaws or the rules;

(c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).

[77] There are two recent decisions of this Court that deal with these provisions.

[78] In *Campbell v. The Owners, Strata Plan NW1018*, 2014 BCSC 2058, Mr. Justice Skolrood stated:

[59] While the *Act* does authorize the court to issue orders concerning the actions of a strata corporation, the court will not lightly do so. One of the central elements of the *Act* is a governance structure under which the owners in a strata development elect a council of their peers to act in their collective best interests. There will rarely if ever be unanimity between the council and all owners concerning every action or decision taken by the council, but that is true in every democratic organization and the mere presence of disagreement does not justify judicial intervention (*Wier v. Strata Plan NW 17*, 2010 BCSC 784 at paras. 26 - 32).

...

[64] Faced with these concerns, one approach would be to simply permit the next election to go ahead with no orders of the court to guide the process. In the event that the concerns of the petitioner materialize and issues arise as to the fairness of the election, a remedy under the *Act* may be sought at that time.

[65] While that approach may fit better with the court's general reluctance to intervene in the affairs of a strata corporation, the petitioner is concerned that the conduct of the previous elections has been such that many owners will simply choose not to attend the next annual meeting and vote in the election. Thus even absent any clear misconduct or breaches of the *Act*, the election will not be properly representative of the interests of all owners.

[79] He then went on to reach conclusions as follows:

[70] As noted above, pursuant to s. 165(a) of the *Act*, the court may order that a strata corporation perform a duty it is required to perform under the *Act*. Exercising this power here, I order that the respondent conduct the next strata council election in strict compliance with the requirements of the *Act*.

[71] To give effect to this order, I further order, pursuant to s. 165(c), that the respondent engage, at its own cost, an independent observer to monitor the conduct of the next council election. The duties of the independent observer will include verifying the identity of every person who registers to vote, and that person's entitlement to vote, and verifying the validity of any proxies that are presented. The independent observer will also oversee the counting of the votes and will verify the results of the election.

[80] In my observation, there is an obvious redundancy making orders that a strata corporation comply with legislation governing its conduct. An order such as that made by Mr. Justice Skolrood in paragraph 71 quoted above seems to be more in keeping with the objectives of that section.

[81] In a more recent decision in *Binichakis v. Porter*, 2015 BCSC 750, Jenkins J. cited *Christensen v. The Owners, Strata Plan KAS468*, 2013 BCSC 1714

[*Christensen*], "for the proposition that the jurisdiction of this court to order a strata corporation to act is limited to current issues" (*Binichakis* at para. 67). In *Christensen* the court said this:

[36] Section 165 gives the court the power to order relief which is in the nature of injunctive relief in order to compel a strata corporation to perform a duty or to cease contravening a requirement under the *Act* or bylaws.

...

[38] The respondent submits, and I agree, that subsection (b) is intended to be applied by a court to remedy or address a current breach. There must be some existing or contemporaneous action of the strata corporation which requires a remedy in the nature of a mandatory injunctive order. As should be obvious from the facts of this case, it is simply too late to issue such an order. The contravention of the *Act* occurred several years ago. The allocation of expenses and collection of levies took place more than three years ago. The

expenditures which were agreed to have been paid and the funds disbursed. Accordingly, the respondent argues, and I agree, that it is not currently contravening the *Act*. There is no evidence before the court to indicate that it intends to contravene the *Act* in the future.

[82] Butler J. in *Christensen* goes on to consider whether s. 165(b) would allow for an order to correct a past contravention by a strata corporation. He does not specifically resolve the question. He indicates that if the authority to do so exists, he would not have exercised that authority in that case.

[83] Mr. Justice Skolrood did not have the *Christensen* authority cited to him. It would appear that that issue was not fully argued before him.

[84] Any authority under s. 164 exists only where significant unfairness in the actions or decisions of the strata corporation has occurred. Section 165 does not have a similar constraint.

[85] I am in general agreement with Mr. Justice Jenkins in *Binichakis* that the remedial authority created by these provisions is to address current conduct or concerns. It is also my view, however, that what is current must be viewed liberally and in the context of the particular circumstances.

[86] In this case, there is currency to the concerns in that there was a past pattern of an apparent lack of willingness to listen to the petitioner as an owner. The general tone of the interactions was confrontational. While specific issues may have been resolved, that occurred in the context of litigation and it is the animus of the interaction that is ongoing.

[87] The respondent readily acknowledges in these proceedings that mistakes have been made. Without that information being made known to all owners, there is likely to be continuing confusion about how the business of the Strata is to be conducted and that needs to be remedied. That is obviously an ongoing and current scenario.

[88] In light of this, I do not agree that there are limitation periods that impact the availability of remedies here.

[89] I do not, however, see the utility of simply making an order, generally, that the Strata Corporation comply with the *Act* and would decline to do so.

[90] In addition, to make an “order that the respondent cease its unfair treatment of the petitioner” would, in my view, be inappropriate. The function of the courts should not be reduced to something akin to a playground supervisor telling attending children to play nice.

[91] Last, I do not see merit in making orders that the respondent cease doing things that it is not currently doing. Courts routinely are called upon to grant remedies for past conduct but there is an obvious redundancy to making an order that a party stop doing something it has already stopped doing as a standalone remedy.

[92] Having made these observations, it is also clear that the *Act* establishes a foundation for orders that are somewhat unique and the circumstances here do, in my view, warrant using that authority. Specifically, I make my order pursuant to s. 165 and therefore will not engage in an analysis of whether there has been significant unfairness for the purposes of s. 164.

Conclusion

[93] There is, in my view, a constructive and appropriate remedy available that will address the lingering current issue. It is my order that the Strata Corporation prepare a communication to be distributed to all individual strata owners. The communication must include that it is being sent by order of this Court and as a result of the respondent’s acknowledged errors in matters of finance and governance in the past. It must insert paragraphs 50 to 52 of this decision into the body of the letter to provide context. In addition, it must point out the errors that have been made in the special levies from 2010 to 2012 and the changes that have been made. It must review the legislation that governs special levies and emergency spending. It must

explain its obligations for disclosure of documents. Last, it must include a synopsis of the requirements for notice of resolutions for special levies and bylaw amendments as well as the process for amendment of such resolutions.

[94] Counsel for the respondent is to prepare a draft of the communication within 60 days of this decision. It is then to be provided to counsel for the petitioner for his review. His comments or concerns are to be reduced to writing for the respondent's consideration within 30 days. Within a further 14 days, the respondent's final draft is to be provided to the petitioner. That final draft with any comments or suggested additional changes from the petitioner is then to be provided to me for review. I will then provide the final form of communication to be distributed.

[95] As indicated, the parties wished to address the issue of costs once this decision was delivered. The parties are directed to schedule a hearing as to costs with trial scheduling.

"Betton J."